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No. 703

In the Supreme Court of the United States

OCTOBER TERM, 1968

CHARLIE W. WARD, CHAIRMAN, CREEK INDIAN ROLL NO. 2765 ET AL., APPELLANTS

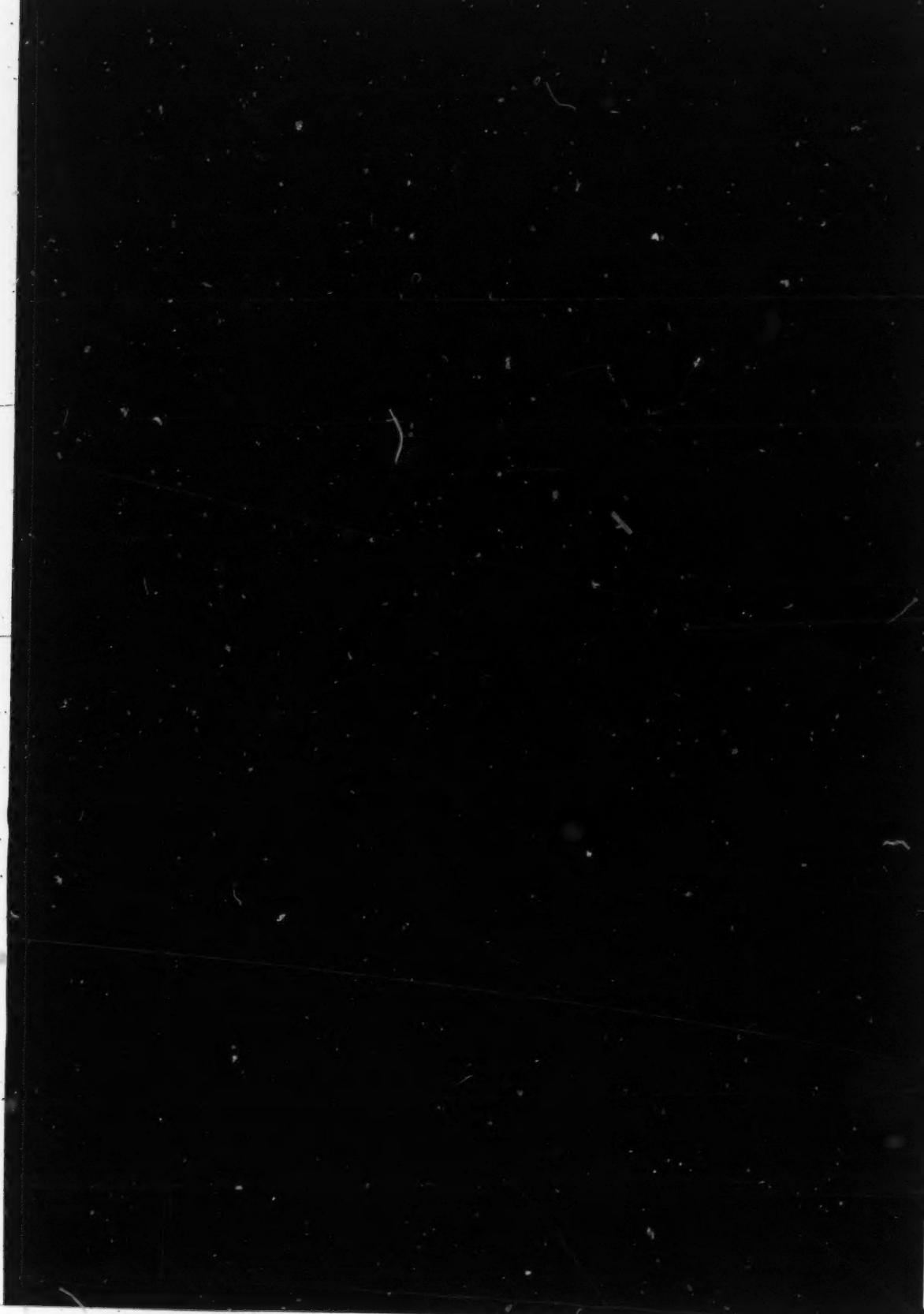
v.

PRESIDENT LYNDON B. JOHNSON ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



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The Solicitor General, on behalf of the appellees, respectfully moves pursuant to Rule 16(1)(a) of the Rules of this Court that the appeal be dismissed for want of jurisdiction.

1. Appellants, as officers of the Creek Indian National Council purporting to represent the Creek Nation (although they are not so recognized by the Secretary of the Interior), instituted this suit in the United States District Court for the Northern District of Illinois, for an order compelling distribution of all Creek tribal funds to those persons listed on the 1907 tribal rolls or to their heirs, setting aside five percent of the Creek funds to pay past and present of-

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ficers of the Creek Indian National Council, and removing the incumbent Principal Chief appointed by the Secretary of the Interior. Appellees' motion to dismiss the action was granted and the action was dismissed on December 13, 1967.[1] On the same day, a motion by appellants to vacate the order of dismissal was continued until December 20, 1967, at which time, on appellants' motion, the court allowed them five days within which to amend their complaint. No amendment was filed, so on January 16, 1968, the motion to vacate the order of dismissal was denied. On May 29, 1968, a letter dated May 22, 1968, was filed seeking "a final decision regarding removal of the President's name from the complaint." The court, treating the letter as a motion, denied it on June 3, 1968, "for lack of jurisdiction." Appellants then filed the present notice of appeal to this Court on June 14, 1968. On August 1, 1968, Mr. Justice Marshall denied a motion for oral argument and for an extension of the time to docket an appeal. Another application for an extension was filed on August 28, 1968, and on August 29, 1968, Mr. Justice Marshall signed an order extending the time for docketing until October 31, 1968, but without prejudice to the Court's consideration of its juris-

[1] Appellees argued that this was, in effect, an unconsented suit against the United States and that, in other respects, the court lacked jurisdiction to compel the action sought. The Act of May 24, 1922, 42 Stat. 575, 25 U.S.C. 124, provides that "No money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress," and in the Act of August 1, 1955, 69 Stat. 431, Congress has directed how certain funds should be distributed and has left entirely to the "judgment" of the Secretary whether the remainder should be distributed.

diction. The appeal was docketed on October 31, 1968.

2. The only authority relied on to permit a direct appeal to this Court, is the Act of July 1, 1898, 30 Stat. 571, 591, which allowed direct appeals from "the United States courts in the Indian Territory" in cases in which "either of the Five Civilized Tribes" is a party, "involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands, in the Indian Territory * * *." But that provision does not cover the subject matter of this suit. And, quite obviously, the district court in this case was not in Indian Territory at any of the times involved. There is no other statute authorizing direct appeal from a district court to this Court in these circumstances.[2]

3. Moreover, under the statute on which appellants rely, even if it were applicable, a direct appeal "must be perfected * * * within sixty days from final judgment * * *." 30 Stat. 591. If we assume *arguendo* that the district court's denial, on June 3, 1968, of a "motion" seeking action on striking the President's name from the complaint constituted the "final judgment" in this case, the appeal was not perfected within sixty days of that judgment and is therefore also out of time. See Rule 34(2) of the Rules of this Court.

Accordingly, the appeal should be dismissed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1968.

[2] Since we are unaware that any appeal has been taken to a court of appeals, there is similarly no certiorari jurisdiction. See 28 U.S.C. 1254(1), 2103.

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